FILED
99 721 AUG 16 1999
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States of America,

In Re
David Leon Durbin
and
Lucrecia Pilar Durbin

On Petition for Writ of Mandamus
to the United States
Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF MANDAMUS

David and Lucrecia Durbin
20127 Horizon Way
San Antonio, Texas 78258
(210) 497-7298 or
(210) 522-7180

18 pp

Questions presented

Whether this Supreme Court should mandate that United States Court of Appeals for the Fifth Circuit Justices Henry A. Politz, Rhesa H. Barksdale and Carl E. Steward provide to David Leon Durbin and to Lucrecia Pilar Durbin a truthful and just opinion and signed judgment on their joint complaint brought on appeal before said Fifth Circuit justices on appeal for the following reasons:

A) Willfully and deliberately shocking the judicial conscience by failing to provide, to Lucrecia Durbin, any due process in not answering any of the 13 citizenship questions on error from the district court and presented for appeal in the Appellant Brief's "Statement of the Issues". ("App 4")

B) Willfully and deliberately violating a federal appellant judges discretion by their failure to clearly and legally define the citizenship status of Lucrecia Durbin, in order to prevent the narrowing of the issues that would aid this Supreme Court in granting a Petition for Writ of Certiorari.

C) Willfully and deliberately attempting to vex, harass or delay this proceeding with a shoddy opinion that demands a Motion to Reconsider.

D) Willfully and deliberately violating a federal appellant judges discretion by their failure to further the rule of law, especially failing in the opportunity to establish any case law whatsoever attached to the 60 year old law, 8 U.S.C. § 1452, concerning which women are authorized to derive citizenship through their husbands, per the terms of 8 U.S.C. § 1452, by failing to provide a signed judgment while ordering this instant case closed to the public, both in terms of publishing and case precedent

PARTIES

Plaintiff-Appellant:

Lucrecia Durbin, disputed citizen of the United States
David Durbin, husband of Lucrecia Durbin

District Court to the Western District of Texas:

Edward C. Prado, District Judge
Gary Layton Anderson, U.S. Attorney

Fifth Circuit Court of Appeals:

Henry A. Politz, Justice
Rhesa H. Barksdale, Justice
Carl E. Steward, Justice

Defendant-Appellee:

Janet Reno, U.S. Attorney General
Jorge Eisermann Jr., INS Acting District Director, Dallas
Kim L. Ogden, INS Assistant Dir of Examinations, Dallas
Robert J. Burton, INS Trial Lawyer, Dallas
Mary F. Agnello, INS Trial Lawyer, Dallas
D. Anthony Rogers, INS Immigration Judge, Dallas
Daniel Solis, INS Acting District Director, San Antonio
Larry L. Nichols, INS Border Control Super., Washington
Mike Wilson, INS Border Control Officer, Washington
J.M. Kohlman, INS Border Control Officer, Washington
Robert F. Peck, INS Trial Attorney, Washington
Kendall Warren, INS Immigration Judge, Washington
Wiley Blakeway, INS Head of Naturalizations, San Antonio
Kenneth Pasquarell, INS District Director, San Antonio
Gregory E. Fehlings, INS Trial Attorney, San Antonio
Edward H. Skerrett, INS Acting Dir. Admin Review Board
Richard F. Brodsky, INS Immigration Judge, San Antonio
Graciela G. Garza, INS Trial Attorney, San Antonio

TABLE OF CONTENTS

QUESTIONS PRESENTED 3

PARTIES 4

TABLE OF CONTENTS 5

TABLE OF AUTHORITIES 6

PETITION FOR WRIT OF MANDAMUS 7

CITATION OF OPINIONS 7

JURISDICTION 7

STATUTES INVOLVED IN THIS CASE 8

STATEMENT OF THE CASE 9

ARGUMENT 11

DEFACTO POLICY OF DEPORTING WIVES OF CITIZENS 11
THERE IS NO CASE LAW FOR 8 U.S.C. § 1452 11
THERE WAS NEVER A REQUEST FOR A REVIEW OF DEPORTATION 12

CONCLUSION 13

APPENDIX 14

UNPUBLISHED AND NON PRECEDENT 14

OPINION 14
STATEMENT OF THE ISSUES 17

TABLE OF AUTHORITIES

Cases

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics Agents, 403 U.S. 388 (1971)..... App 2
Gout v Zimmerman (1847)
5 Notes of Cases 440; 9 LTOS 419..... 2
Humphries v Various Federal USINS Employees,
164 F.3d 936, (5th Cir. 1999)..... App 3
In Re Page, 12 F.2d 135
(DC S.D. California March 31, 1926)..... 1, 2, 4
Reno v American-Arab Anti-Discrimination Comm,
119 S.Ct. 936..... App 3

Statutes

8 U.S.C. § 1252(g)..... 1, 5, App 2, App 3
8 U.S.C. § 1452..... passim
28 U.S.C. § 1291..... 4
28 U.S.C. § 1651(a)..... 2
66 Stat 263..... 1, 2
Revised Statue 1994..... App 4
Cable Act of September 22, 1922..... App 5
8 U.S.C. 1251(a)2..... App 7

Regulations

8 C.F.R. § 341..... 7, App 4

Rules

Supreme Court Rule 20..... 2
5th Cir. R. 47.5..... App 2
5th Cir R. 47.5.4..... App 2

PETITION FOR WRIT OF MANDAMUS

David Leon Durbin and Lucrecia Pilar Durbin ("Durbin") prays that a writ of mandamus issue to mandate a truthful and just opinion and signed judgement from the United States Court of Appeals for the Fifth Circuit of the district court errors in place of the shoddy opinion entered on July 1, 1999.

Citation of Opinions

The opinion of the United States Court of Appeals for the Fifth Circuit is not published or precedent setting, but is reprinted in the Appendix hereto ("App A") at page App. 1. Per the Rules of Appellate Procedure, Rule 36, "The clerk shall, on the date judgement is entered, mail to all parties a copy of the opinion, if any, or of the judgement if no opinion was written". Since an opinion was entered, the clerk only mailed a copy of the opinion but not also a copy of the judgement; therefor, a copy of the judgment is not reprinted in the Appendix hereto.

Jurisdiction

Congress last amended law 66 Stat 263 (8 U.S.C. § 1452.) over 47 years ago on June 27, 1952. Congress created the original 8 U.S.C. § 1452 in 1940. Federal case law established in March 31, 1926, as In Re Page, 12 F.2d 135 provides the legal basis for the application of 8 U.S.C. § 1452 upon Mr. and Mrs. Durbin. Defendants have made arguments to counter Plaintiff's arguments, and so establish a case in controversy. The United States Court of Appeals for the Fifth Circuit was requested to review this instant case in controversy on the merits but instead issued an opinion that they were barred from hearing the case pursuant to 8 U.S.C. § 1252(g) and issued said opinion on

July 1, 1999. This Supreme Court has jurisdiction to review this Petition for Writ of Mandamus, having been granted that jurisdiction by way of 28 U.S.C. 1651(a), as expressed in Supreme Court Rule 20. There are no questions of the constitutionality of any Act of Congress as the complaint is primarily argued.

Statutes involved in this case

A) ***Common Law of England*** (one of four examples)

A testarix born at Smyrna of Dutch or Russian parents, residing there under the protection of the Dutch Consulate, married a British subject, who, though residing abroad as consul and for purposes of trade, retained his British domicil. ...Held prima facie she was entitled to be considered a British subject, having done so by marriage...*Gout v Zimmerman* (1847) 5 Notes of Cases 440; 9 LTOS 419

B) ***Common Law of the United States***

"It is, however, true that in all common-law countries it has always and consistently been held that the wife and minor children take the nationality of the husband and father. That is the common-law doctrine."

In re Page, 12 F.2d 135 (DC S.D. California March 31, 1926)

C) ***66 Stat 263 (8 U.S.C. § 1452)*** *

A person who claims to have derived United States citizenship through the naturalization of a parent or ***through the*** naturalization or ***citizenship of a husband***, or who is a citizen of

the United States by virtue of the provisions of section 1993 of the United States Revised Statutes, or of section 1993 of the United States Revised Statutes, as amended by section 1 of the Act of May 24, 1934 (48 Stat. 797), or who is a citizen of the United States by virtue of the provisions of subsection (c), (d), (e), (g), or (i) of section 201 of the Nationality Act of 1940, as amended (54 Stat. 1138), or of the Act of May 7, 1934 (48 Stat. 667), or of paragraph (c), (d), (e), or (g) of section 1401 of this title, or under the provisions of the Act of August 4, 1937 (50 Stat. 558), or under the provisions of section 203 or 205 of the Nationality Act of 1940 (54 Stat. 1139), or under the provisions of section 1403 of this title, ***may apply to the Attorney General for a certificate of citizenship***. Upon proof to the satisfaction of the Attorney General that the applicant is a citizen, and that the applicant's alleged citizenship was derived as claimed, or acquired, as the case may be, and upon taking and subscribing before a member of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, ***such individual shall be furnished by the Attorney General with a certificate of citizenship, but only if such individual is at the time within the United States.***

* Emphasize added

Statement of the Case

This case arises out of an unsuccessful attempt by Plaintiff-Appellants David and Lucrecia Durbin to obtain, from the Attorney General, a Certificate of Citizenship per the terms Congress enacted in 8 U.S.C. § 1452 for persons having a derivative citizenship.

Mr. Durbin's wife had met and continues to meet all requirements for obtaining a derivative citizenship to the United States of America

by having married a citizen of the United States of America while being domiciled within the United States of America. The basis for Mrs. Durbin's derivative citizenship was obtained through the English Common Law and said common law is recognized as continuing within the United States of America by way of Federal case law. (**In Re Page**, 12 F.2d 135)

Certain members of the Immigration and Naturalization Service and others have fraudulently denied Mr. and Mrs. Durbin the benefits of said derivative citizenship; therefor, causing Mr. and Mrs. Durbin damages.

Mr. and Mrs. Durbin filed a complaint with the District Court for the Western District of Texas, seeking the District Court to issue an order in the nature of a Writ of Mandamus ordering the Attorney General to issue a Certificate of Citizenship to the wife of David Durbin. Per the terms of the Act of Congress embodied as 8 U.S.C. § 1452, the Attorney General shall issue a Certificate of Citizenship to any woman who claims to have derived citizenship through the citizenship of her husband coupled with her domicile within the United States of America. Damages were demanded subsequent to the citizenship fraud involved in the denial of said Certificate of Citizenship to the wife of David Durbin as well as constitutional deprivations caused by the treatment of David Durbin's wife as an alien instead of as a citizen of the United States of America.

On motion for summary judgement, March 31, 1998, District Judge Edward Prado dismissed the complaint. A motion to reconsider was denied on May 28, 1998.

An appeal of this final decision of the District Court to the Fifth Circuit Court of Appeals ensued on September 23, 1998 (Jurisdiction: 28 U.S.C. § 1291)

The Fifth Circuit Court of Appeals affirmed the lower court on July 1, 1999, sue sponte, by re-stating the simple and direct mandamus case for a Certificate of Citizenship as actually an appeal of a

deportation proceeding. This is simply not true. The complaint never asked any jurisdiction to review the null and void deportation order entered upon Mrs. Durbin, a United States citizen. Then, in a bizarrely distorted train of logic, the Fifth Circuit argued that they did not have jurisdiction at all to decide Mrs. Durbin's citizenship because the federal courts do not have jurisdiction over aliens (sic) per 8 U.S.C. § 1252(g).

ARGUMENT

David and Lucrecia Durbin prays that this Supreme Court grant our Petition for a Writ of Mandamus to settle this important question of federal law, "Who is a citizen of the United States of America".

Defacto policy of deporting wives of citizens

The Immigration and Naturalization Service currently has a defacto policy of deporting the wives of American citizens. This policy then acts to deport American citizens, as any responsible American citizen then has a responsibility to follow his wife into deportation. This truly exceptional circumstance violates the supposedly one and only inalienable right that Americans are said to still enjoy, "the right to not be expatriated".

There is no case law for 8 U.S.C. § 1452

This Supreme Court should have decided this citizenship question at the founding of this country, and again in 1855, in 1922, in 1940, and in 1952, but this is a question that to this date has never been answered. Nor would you have answered this question, because by every annotated case we have seen attached to 8 USC § 1452 **no**

Court of Appeals has ever published an opinion on derivative citizenship for wives. Why? We do not know.

This Petition for a Writ of Mandamus will; aid your appellate jurisdiction, by forcing the lower courts to rule on this issue, with the effect of narrowing the issues for your subsequent review in a Writ of Certiorari.

There was never a request for a review of deportation

The avoidance of answering this citizenship question in this instant case is painfully obvious; for certainly, David and Lucrecia Durbin have never asked anyone to review any null and void order of deportation made against a citizen of the United States by an immigration judge having no jurisdiction to deport citizens. The Fifth Circuit had to bend all reason and logic to avoid answering this question.

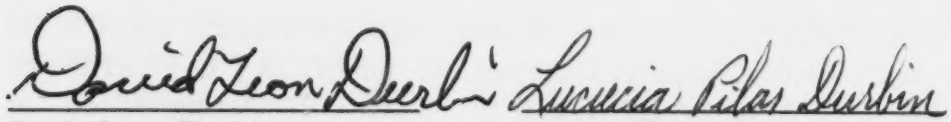
Just as the deportation judge ruled that Mrs. Durbin's motion to wait on a ruling on a review of Mrs. Durbin's citizenship status from the Administrative Review Unit of the INS was not a bar to him ruling on her deportation, we beg that you do not reverse the logic and state that the deportation is a bar to your ruling on Mrs. Durbin's citizenship. We beg that non-issues such as this do not lead you away from the real issue of the citizenship of David Durbin's wife, Lucrecia Pilar Durbin.

Conclusion

If the Fifth Circuit Court of Appeals is allowed to ignore common law derivative citizenship, is allowed to ignore federal case law concerning common law derivative citizenship and will not create any case law on derivative citizenship per either Congress's statute, 8 U.S.C. § 1452, or the INS agency's regulation 8 C.F.R 341, then David Leon Durbin and his sons will surely be deported from the United States just as assuredly as his wife will be deported. Mr. Durbin will then have been effectively stripped of any Constitutional protections he thought he enjoyed in regards to family and his religious obligations to his family through his Sacrament of Matrimony.

Therefor, petitioners David and Lucrecia Durbin politely request this Supreme Court to grant this extraordinary Writ of Mandamus requiring Justices Politz, Barksdale, and Steward to further the rule of law, requiring of them that due process be upheld and requiring of them to aid this Supreme Court in narrowing the issues for a Writ of Certiorari, by ordering the Fifth Circuit justices to render a full legal opinion, on the issues presented, in civil case 98-50742, Durbin vs. Reno.

Respectfully submitted,



David Leon Durbin
20127 Horizon Way
San Antonio, Tex. 78258
(210) 497-7298
(210) 522-7180 (W)

Lucrecia Pilar Durbin
20127 Horizon Way
San Antonio, Tex. 78258
(210) 497-7298

APPENDIX

UNPUBLISHED AND NON PRECEDENT

OPINION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50742
Summary Calendar

LUCRECIA PILAR DURBIN and DAVID LEON DURBIN.
Plaintiffs-Appellants,

versus

JANET RENO, U.S. Attorney General; JORGE EISERMANN, Jr., Acting District Director, INS; KIM L. OGDEN, Assistant Director of Examinations, INS; ROBERT J. BURTON, INS, Trial Attorney; MARY F. AGNELLO, INS, Trial Attorney; D. ANTHONY ROGERS, Special Inquiry Officer; DANIEL SOLIS, Acting District Director, INS; LARRY L. NICHOLS, INS, Control Supervisor; MIKE WILSON, Border Control Officer, INS; J.M. KOHLMAN, Border Control Officer, INS; ROBERT F. PECK, INS, Trial Attorney; KENDALL WARREN, Special Inquiry Officer; WILEY BLAKEWAY, Immigration & Naturalization Service; KENNETH PASQUARELL, District Director, INS; GREGORY E. FEHLINGS, INS, Trial Attorney; EDWARD H. SKERRETT, Acting Director of the AAU; RICHARD F. BRODSKY, Special Inquiry Officer; GRACIELA G. GARZA, Assistant District Counsel, INS,
Defendant-Appellees.

Appeal from the United States District Court
For the Western District of Texas
(USDC No. SA-98-CV-35)

Before POLITZ, BARKSDALE, and STEWART, Circuit Judges.
PER CURIAM:*

Lucrecia and David Durbin appeal, pro se, the dismissal of their complaint arising out of deportation proceedings brought against Lucrecia Durbin.

---

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir R. 47.5.4.

On 4 August 1997, an immigration judge ordered Lucrecia Durbin deported. Subsequently, the Durbins sought mandamus compelling the Attorney General to issue a certificate of citizenship to Lucrecia Durbin. The Durbins contend that Lucrecia Durbin, a native of Guatemala, is a United States citizen by virtue of her marriage to David Durbin.

The Durbins also sought money damages for claimed constitutional violations committed during Lucrecia Durbin's application for citizenship and during deportation proceedings. They claim that the appellees discriminated against the class of women who derived United States citizenship from the citizenship of their husbands, and discriminated against the class of men whose wives derived United States citizenship from the citizenship of their husbands.

Finally, David Durbin claimed that he was unlawfully arrested by border patrol officials, giving rise to a claim under **Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics Agents**, 403 U.S. 388 (1971).

Pursuant to 8 U.S.C. § 1252(g), "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter". The Durbins' request

For mandamus arises from the Attorney General's initiation of deportation proceedings against Lucrecia Durbin. The district court concluded properly that it did not have subject-matter jurisdiction over the mandamus request. **See Reno v. American-Arab Anti-Discrimination Comm.**, 119 S.Ct. 936, 943 (1999) (§ 1252(g) precludes judicial review of Attorney General's decision to "commence proceedings, adjudicate cases, or execute removal orders")(quoting 8 U.S.C. § 1252(g)); see also **Humphries v. Various Federal USINS Employees**, 164 F.3d 936, 942-43 (5th Cir. 1999).

The Durbins claims for related money damages arose from the Attorney Generals' initiation of deportation proceedings. Again, the district court concluded properly that it did not have subject-matter jurisdiction over the issue. See **American-Arab**, 119 S.Ct. at 946-47 (§ 1252(g) precluded review of claim that aliens were being deported in violation of First Amendment rights); **Humphries**, 164 F.3d at 945 (claim for retaliatory exclusion is barred by § 1252(g)).

David Durbin's unlawful arrest claim, however, is not jurisdictionally barred under § 1252(g). See **Humphries**, 164 F.3d at 941 (holding that appellant's claims of involuntary servitude and mistreatment while in detention were not barred by § 1252(g)).

Accordingly, that part of the judgement as to David Durbin's unlawful arrest claim is **VACATED** and the case **REMANDED** for

consideration of that claim; the remainder of the judgement is **AFFIRMED.**

AFFIRMED in part, VACATED and REMANDED in part

EXCERPT FROM PLAINTIFF'S COMPLAINT

STATEMENT OF THE ISSUES

ISSUE ONE:.....Whether the Constitution for the United States of America, in order for the United States government to fully protect and defend each and every unalienable right belonging to David Leon Durbin as one of the People of the United States, mandates David Leon Durbin's wife to be a derivative citizen of the United States of America.

ISSUE TWO:.....Whether Congress, by way of 8 U.S.C. § 1452, plainly and clearly authorizes any woman, married to a citizen of the United States and domiciled within, to claim a derivative citizenship to the United States of America or Whether 8 U.S.C. §1452 only allows women who acquired citizenship prior to September 22, 1922, by way of the unstated Revised Statue 1994, to apply for a certificate of citizenship.

ISSUE THREE:.....Whether the regulation 8 C.F.R. § 341, clearly and plainly defines a class of all women, married to citizens of the United States and domiciled within, allowed to claim a derivative citizenship to the United States and thereafter apply for a certificate of citizenship, or Whether the regulation, 8 C.F.R. § 341, only defines the class of all women married before 1922, pursuant to the unstated Revised Statute 1994, to be United

States citizens who may thereafter apply for a certificate of citizenship.

ISSUE FOUR:.....Whether Section 2 of the Cable Act of September 22, 1922 was merely affirmative of the part of the common law which states "a woman in no way gains citizenship by marrying a citizen", and thus never overrode the common law of derivative citizenship which states "a woman in no way gains citizenship by marrying a citizen, unless she is also domiciled within the United States.

ISSUE FIVE:.....Whether Section 2 of the Cable Act of September 22, 1922 effectively overrode the common law that states that "a woman in no way gains citizenship by marrying a citizen, unless she is also domiciled within the United States.

ISSUE SIX:.....Whether the repeal, on October 14, 1940, of Section 2 of the Cable Act of September 22, 1922 revived the common law of a woman deriving citizenship to the United States through the citizenship of her husband and domicile within the United States, or if Section 2 of the Cable Act of September 22, 1922 was only affirmative of a portion of the common law. Whether the common law doctrine of derivative citizenship is still in existence.

ISSUE SEVEN:.....Whether Lucrecia Pilar Durbin is a derivative citizen of the United States by way of the common law, having derived her citizenship through the citizenship of her

husband and her residence within the United States.

ISSUE EIGHT:.....Whether the Preamble to the Constitution for the United States of America mandate that the federal government defend and protect David Leon Durbin's wife from deportation by Defendant-Appellee INS agency officials, whether she herself is an alien or not.

ISSUE NINE:.....Whether the Preamble to the Constitution for the United States of America mandate that the federal government defend and protect David Leon Durbin's unalienable rights to liberty and pursuit of happiness by preventing the deportation of Mr. Durbin's wife by Defendant-Appellee INS agency officials, whether she herself is an alien or not.

ISSUE TEN:.....Whether the First Amendment to the Constitution for the United States of America disallows Congress from passing any law that would interfere in David Leon Durbin's Sacrament of Matrimony with Lucrecia Pilar Durbin, whether she herself is an alien or not.

ISSUE ELEVEN:.....Whether Congress, as the People's representatives, can be constitutionally delegated authority from the People to deport a citizen's wife when none of the People themselves can legally enter another's private property and seize any member of their fellow citizen's family.

ISSUE TWELVE:.....Whether the Immigration and Naturalization Service, an administrative agency, can be constitutionally delegated authority from the People, through Congress, to deport a citizen's wife, when none of the People themselves can legally enter another's private property and seize any member of their fellow citizen's family.

ISSUE THIRTEEN:...Whether 8 U.S.C. 1251(a)2 is unconstitutional when applied to spouses of United States citizens.

ISSUE FOURTEEN:....Whether David Leon Durbin's person can be seized by Defendant-Appellee INS agency officials without Mr. Durbin being charged with the violation of any crime, thereby disallowing any judicial review, which therefor disallows any remedy for the violations of many of Mr. Durbin's constitutionally protected rights.